Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

REVERIA TAVERN, INC.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a liquor permit holder have a legitimate claim of entitlement in a liquor permit duly issued by the State and, if so, does such entitlement confer a property interest in the liquor permit subject to the protection of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Where remedies are available prior to election for pre-election violations, are such remedies mooted by the occurrence of election despite the presence of controversy and continuing harm?

3. Is an aggrieved party's right to an adequate and meaningful opportunity to be heard violated when judicial review ceases upon the occurrence of an election?

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1. Magistrate's Order, *Reveria Tavern, Inc. v. Summit County Board of Elections*, Court of Common Pleas, Summit County, State of Ohio, Case No. CV 03 10 5849, filed November 26, 2003. (Appendix A)

2. Order, *Reveria Tavern, Inc. v. Summit County Board of Elections*, Court of Common Pleas, Summit County, State of Ohio, Case No. CV 03 10 5849, filed December 22, 2003. (Appendix B)

3. Decision and Journal Entry, *Reveria Tavern, Inc. v. Summit County Board of Elections*, Court of Appeals for the Ninth Appellate District, Summit County, No. 21893, filed December 15, 2004. (Appendix C)

4. Entry, *Reveria Tavern, Inc. v. Summit County Board of Elections*, Ohio Supreme Court, No. 05-219, filed May 11, 2005. (Appendix D)

5. Reconsideration Entry, *Reveria Tavern, Inc. v. Summit County Board of Elections*, Ohio Supreme Court, No. 05-219, filed July 13, 2005. (Appendix E)

JURISDICTION

The Ohio Supreme Court declined jurisdiction to review Petitioner's appeal on May 11, 2005. On July 13, 2005, the Ohio Supreme Court declined to reconsider its decision. Petitioner seeks review of the final judgment by the highest court in which a decision could be had and invokes this Court's jurisdiction under 28 U.S.C.A. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History

This case arose from two local option petitions that were circulated for the purpose of placing two questions on the ballot for the November 4, 2003 general election in Ohio.[1] The petitions affected the liquor license issued to REVERIA TAVERN, INC. (Reveria), Petitioner herein, by the State of Ohio Division of Liquor Control. The option petitions called for the elimination of sales and consumption of beer and spiritous liquor in Ward 7, Precinct I in the City of Akron.[2] A protest was timely filed by Reveria whereby a hearing was scheduled on September 9, 2003 before the SUMMIT COUNTY BOARD OF ELECTIONS (Board), Respondent herein.[3]

Two issues were presented to the Board before the Board could proceed on Reveria's protest: (1) the Board was to conduct an investigation of the U. S. Postal Service in Akron to determine whether the mail carrier in fact made an attempt to deliver the certified mail containing the notice as required by §4301.33 of the Ohio Revised Code (R.C.); and (2) the Board requested a prosecutor's opinion regarding

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[1]See Decision and Journal Entry (Decision) filed December 15, 2004, In the Court of Appeals, Ninth Judicial District, Appx. __.

[2]Decision, Appx. __.

[3]Decision, Appx. __.

requirements mandated by R.C. §3501.38(C) and §4301.33.[4] Reveria contended that it never received the certified mail from the Board.[5] Accordingly, the Board continued the matter to be heard on September 23, 2003. The Board failed to conduct the post office investigation.[6] The Board refused to provide Reveria additional time to conduct its own investigation, due to the Board's failure to investigate as such.[7] At the conclusion of the hearing, the Board voted to reject Reveria's protest.[8]

On October 9, 2003, approximately one month prior to the November 4, 2003 election, Reveria filed a Complaint for a Writ of Mandamus, a Writ of Prohibition and Injunctive Relief in the Court of Common Pleas, Summit County, Case No. 2003-10-5849, filed herein.[9] This complaint was filed due to the Board's denial on Reveria's protest. The matter was assigned to the Magistrate.

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[4]See Common Pleas Court, Transcript of Proceedings (Court T.p.), Appx. __ - __; also see Summit County Board of Elections, Transcript of Proceedings, September 9, 2003 (Board T.p.-1), Appx. __-__; and Summit County Boar of Elections, September 23, 2003 (Board T.p.-2), Appx. __-__.

[5]Decision, Appx. __.

[6]Board T.p.-2, Appx. __.

[7]Board T.p.-2, Appx. __.

[8]Board T.p.-2, Appx. __.

[9]See Complaint for a Writ of Mandamus, a Writ of Prohibition and Injunctive Relief (Complaint) filed October 9, 2004, Appx. __.

On October 27, 2003, the Board filed its Motion for Summary Judgment. In the meantime, the general election was held on November 4, 2003. Reveria filed its Opposition to Defendant's Motion for Summary Judgment on November 17, 2003. A hearing on the Board's motion was held on November 24, 2003 before the Magistrate. The Magistrate handed his decision on November 26, 2003.[10] Reveria objected to the Magistrate's Decision, to which the Board filed a reply. The trial court issued an Order on December 22, 2003 sustaining the Magistrate's Decision, except that the Magistrate, according to the trial court, erred in finding that Reveria's relief was by way of appeal under R.C. §2506.01.[11]

On January 9, 2004, Reveria appealed the trial court's Order to the Court of Appeals for the Ninth Appellate District.[12] On appeal, Petitioner claimed that (1) the option petitions were invalid due to the circulators' failure to strictly comply with R.C. §3501.38(C) and (2) Petitioner was denied due process of law due to the Board's failure to afford adequate and meaningful opportunity to heard during the protest hearing under R.C. §4301.33 guaranteed by the Fourteenth Amendment to the United States Constitution.[13] The court of appeals affirmed the trial court's order on December 15, 2004. With regard to Petitioner's protest, the

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[10]See Magistrate's Order filed November 26, 2003, Appx. __.

[11]See Order filed December 15, 2003, Appx. __.

[12]See Notice of Appeal filed January 9, 2004, Appx. __.

[13]See Amended Brief of Appellant filed May 3, 2004, Appx. __.

court of appeals found that "protest matters must be brought and *resolved* before an election is held, or else they are rendered moot and no further remedy is available."[14] The court of appeals, however, failed to address Petitioner's argument on adequate and meaningful opportunity to be heard under the Fourteenth Amendment to the United States Constitution.

On February 4, 2005, Petitioner appealed the court of appeals' Decision to the Ohio Supreme Court.[15] On May 11, 2005, the Ohio Supreme Court declined jurisdiction.[16] Petitioner moved for a reconsideration, which the Ohio Supreme Court declined on July 13, 2005.[17]

B. Facts Presented Before the Board and Trial Court

Reveria is a corporation duly organized under the laws of the State of Ohio, doing business as Belmont Grille located at 782 Lovers Lane, Unit B, Akron, Ohio 44306.[18] Reveria holds a valid liquor permit issued by the Division of Liquor Control, State of Ohio, allowing Reveria to sell liquor

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[14]Decision, Appx. __.

[15]See Notice of Appeal to the Supreme Court of Ohio filed February 4, 2005, Appx. __.

[16]See Entry filed May 11, 2005, Appx. __.

[17]See Reconsideration Entry filed July 13, 2005, Appx. __.

[18]See Affidavit of Omar "Roy" Salaheddine (Affd.), attached to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Opposition), Appx. __.

beverages in its business.[19] The building in which Reveria operates its business has been in the same location for over 40 years.[20] Reveria's place of business is a widely-known gathering place for members of the community.[21]

David P. Reymann was the Petitioner and circulator of the local option election petitions.[22] Between July 24, 2003 and August 2, 2003, Mr. Reymann and Gladys L. Henderson circulated a Petition for Election on Question of the Sale of Beer by C and D Permit Holders, by way of part-petitions, pursuant to Revised Code Sections 3501.38, 4305.14 and 4305.15,[23] to wit:

> "Shall the sale of beer as defined in section 4305.08 of the Revised Code under permits which authorize sale for off-premises consumption only, and under permits which authorize sale for both on-premises and off-premises consumption, be permitted in this Akron 7-I?"

Also, between July 24, 2003 and August 2, 2003, pursuant to Revised Code Sections 3501.38, 4301.32 to 4301.39, Mr. Reymann and Ms. Henderson circulated a Local Option

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[19]Opposition, Appx. __.

[20]Opposition, Appx. __.

[21]Opposition, Appx. __.

[22]Board T.p.-1, Appx. __.

[23]Opposition, Appx. __.

Election Petition, by way of part-petitions, to place a question for election,[24] to wit:

> "Shall the sale of spirituous liquor by the glass be permitted in 7-I?"

The underlying purpose of the petitions was designed not to dry up Ward 7, Precinct I, but to specifically target Reveria and oust Reveria from Precinct I.[25] The circulated petitions directly affect Reveria's ability to sell liquor beverages, which is the livelihood of its business.[26] Passage of the petitions would mean termination of Reveria's livelihood at Ward 7–I.[27]

Reveria protested the validity of the petitions before the Board. A hearing was held on September 9, 2003. Two issues were raised before the Board at the protest hearing: (1) whether the Board, in validating the petitions circulated by Mr. Reymann, complied with R.C. §3501.38(C);[28] and (2) whether the Board, in adopting Mr. Reymann's form of notification, complied with the notice requirement under R.C. §4301.33(A)[29].

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[24]Opposition, Appx. __.

[25]Opposition, Appx __;Board T.p.-2, Appx. __.

[26]Opposition, Appx. __.

[27]Opposition, Appx. __.

[28]Board T.p.-1, Appx. __.

[29]Board T.p.-1, Appx. __.

As to issue one, Mr. Reymann admitted that he filled-in "a lot of the county and city" which the signor failed to fill-in.[30] Also, Mr. Reymann filled-in the dates which the signor failed to fill-in.[31] Mr. Reymann further admitted that he did not fill-in the city, county and date in front of the signers.[32]

As to issue two, Mr. Reymann sent the notice of the petitions via certified mail.[33] However, Mr. Reymann misspelled Reveria's name on the envelope containing the notice.[34] Reveria denied receiving any notice of the petitions.[35] Reveria further denied ever receiving the envelope containing the notice or ever receiving any notice regarding certified mail.[36] The Board expressed its concerns regarding the notice issue. There were questions as to what was meant by the notations on the envelope indicating "unclaimed" and "other."[37] There were also questions as to whether the term "refused" would be indicated on the

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[30]Board T.p.-1, Appx. __; Board T.p.-2, Appx. __.

[31]Board T.p.-2, Appx. __.

[32]Board T.p.-2, Appx. __.

[33]Board T.p.-1, Appx. __.

[34]Board T.p.-1, Appx. __.

[35]Board T.p.-1, Appx. __.

[36]Board T.p.-1, Appx. __.

[37]Board T.p.-1, Appx. __.

envelope if the addressee refused to accept delivery when presented with the certified mail.[38] According to the Board, it would investigate the matter with the U.S. Postal Service.[39] The Board, therefore, continued the hearing to September 23, 2003 pending its investigation.[40]

On September 23, 2003, the issue of notice was, again, raised.[41] However, the Board failed to conduct the investigation it promised to do.[42] According to Reveria's counsel, Reveria would have investigated the matter itself, but the Board assumed the duty to investigate.[43] Therefore, Reveria did not investigate, since it relied on the Board's representation.[44] A Board member commented that the matter should be further continued until the Board received the proper information from the post office.[45] However, the Board refused to hold further hearings, or to complete the investigation. The Board rejected Reveria's protest in its entirety.

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[38]Board T.p.-1, Appx. __.

[39]Board T.p.-1, Appx. __-__.

[40]Board T.p.-1, Appx. __.

[41]Board T.p.-2, Appx. __.

[42]Board T.p.-2, Appx. __.

[43]Board T.p.-2, Appx. __.

[44]Board T.p.-2, Appx. __.

[45]Board T.p.-2, Appx. __.

REASONS FOR GRANTING THE WRIT

A. Right to Entitlement and Property Interest

The right to earn one's livelihood is a fundamental, inalienable right. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589-590 (1897); also *Hodges v. U.S.*, 203 U.S. 1, 35-36 (1906) (Harlan, dissenting). The fundamental right given in the instant case is the right to conduct one's business, the dispensing of liquor.

Petitioner does not contest the State's power to regulate the dispensation of liquor within its borders and the areas in which such may be dispensed, but rather, the State's ability to regulate once such a right has been conferred. To exercise the latter, does the State have unfettered power? Petitioner argues that it does not. This includes whether or not an election by the electorate has been held. That is why we have laws to keep the majority, or powerful, in check. Where a right has been conferred, a citizen has an entitlement to its employment. A property interest is, therefore, created that is subject to the confines of the Fourteenth Amendment to the United States Constitution.

Section 1 of the Fourteenth Amendment provides, in part:

> * * * No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Twenty-First Amendment has permitted once again the sale and production of liquor. The States have exercised their police power in regulating their sale and production within their respective borders. In doing so, they have given their approval to merchants who had duly complied with state requirements. It is a revenue generating undertaking by the merchants, as well as by the States.

Once a State confers a right to perform one's chosen livelihood, a property interest attaches which is protected by the United States Constitution, the deprivation of which shall not be attained unless certain procedural safeguards, which are to be exercised adequately and meaningfully, are provided. The State of Ohio does not agree with this proposition when it comes to liquor licenses. It picks and chooses what rights should be afforded constitutional protection; and when it does provide some constitutional protection, it picks and chooses how much should be afforded to a point where the afforded protection becomes meaningless.

In *Kentucky Department of Corrections v. Thompson*, this Court held –

> * * * We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972); the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient, *Hewitt v. Helms,* 459 U.S.,

> at 472, 103 S.Ct., at 871. The types of interests that constitute "liberty" and "property" for Fourteenth Amendment purposes are not unlimited; the interest must rise to more than "an abstract need or desire," *Board of Regents v. Roth,* 408 U.S., at 577, 92 S.Ct., at 2709, and must be based on more than "a unilateral hope," *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 465, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158 (1981). Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interests "may arise from two sources--the Due Process Clause itself and the laws of the States." *Hewitt v. Helms,* 459 U.S., at 466, 103 S.Ct., at 868.

490 U.S. 454, 459-460 (1989). In terms of licenses issued by the government, including liquor licenses, the Court of Appeals for the Sixth Circuit so eloquently stated in *Brookpark Entertainment, Inc. v. Taft* –

> * * * "Government licenses are ... a form of property insofar as they constitute an entitlement to engage in a valuable activity." 2 Ronald D. Rotunda et al., Treatise on Constitutional Law: Substance and Procedure §17.5 (1986). An individual having "present enjoyment of the benefit and a claim of entitlement to its continuation under state law ... [has] a property interest which [is] protected by the due process clause." *Id.*
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> To decide whether a liquor license is property under the Due Process Clause, we must examine both Ohio

law and federal constitutional law. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978) (citations omitted). The license may rise to the level of property under the Due Process Clause even though Ohio chooses not to call it property. "[W]e must look behind labels, and decide whether the plaintiffs' license was 'property' in a functional sense." *Reed v. Village of Shorewood,* 704 F.2d 943, 948 (7th Cir.1983) (citations omitted). In short, we look to Ohio law to determine the *nature* of the interest, not the *label* to apply to it.

We therefore begin our inquiry by examining the interests that attach to an Ohio liquor license. We recently examined Ohio liquor licenses to determine whether they are property for the purposes of federal tax and bankruptcy law. *In re Terwilliger's Catering Plus, Inc.,* 911 F.2d 1168 (6th Cir. 1990). In concluding that Ohio liquor licenses are property, we stated:

> Ohio allows a liquor license to be transferred, sold, inherited, and renewed. *See generally,* Ohio Rev.Code Ann. §§4303.26, 4303.271, and 4303.273 (Anderson 1988) and Ohio Admin. Code § 4301:1-1-14. It is undeniable that a

> liquor license has pecuniary value to its holder since the license enables the holder to sell alcoholic beverages and can be sold for value. Since the state has vested the owner of a liquor license with these beneficial interests, a liquor license constitutes "property" or "rights to property" within the meaning of federal tax lien law.

Id., 911 F.2d at 1171 (footnote omitted).

In addition to the rights to transfer, sell, bequeath, and renew, a holder of an Ohio liquor license also has the right to a hearing before revocation and the right to appeal any adverse determination of the Department. Ohio Rev.Code §§4301.27, 4301.28. In *Reed*, the Seventh Circuit held that an Illinois liquor license was property within the meaning of the Due Process Clause even though it could not be sold or bequeathed. 704 F.2d at 948. The court found that the Illinois license was property because the holder had a right of renewal and the license could be securely held for its term unless there was cause for revocation. *Id.* While the Ohio revocation provision does not state that a license can be revoked only for cause, the notice, hearing, and appeal provisions would be pointless unless the legislature intended there to be some reason for revocation. Since an Ohio license can be sold and bequeathed, it has even more of the attributes of property than the Illinois license at issue in *Reed*.

951 F.2d 710, 714-715 (1992). Accordingly to the Sixth Circuit Court of Appeals, Ohio treats liquor licenses as if they were property except in name.

The Ohio law which refused to recognize any substantive property right in liquor licenses is contained in *State ex rel. Zugravu v. O'Brien* (1935), 130 Ohio St. 23. The Ohio Supreme Court held in *Zugravu* –

> The permits of relator were by the terms of the statute issued expressly subject to termination in the way provided. She had therefore mere revocable licenses and no more. Such a permit is not a property right in the constitutional sense and, if it may be considered in the nature of property at all, it is limited in its scope by the same legislative act which gives it existence, and the reservation of the power of termination enters into and becomes a part of the grant of permission to carry on the specified business. It follows that if the permit is terminated in a lawful manner under the provisions of the act creating it, the licensee cannot complain as his license to operate was issued to him subject to that contingency. The holdings are uniformly to the effect that such a license does not create a property right within the constitutional meaning of that term, nor even a contract, and that it constitutes a mere permission to engage in the liquor business, which may be revoked in the prescribed legislative manner. *La Croix v. County Commissioners*, 49 Conn. 591; Id., 50 Conn. 321, 47 Am. Rep. 648; *Sprayberry v. City of Atlanta*, 87 Ga. 120, 13 S. E. 197; *Martin v. State*, 23 Neb. 371, 36 N.

> W. 554; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Gubin v. City of New York*, 150 Misc. 182, 269 N. Y. S. 46; *People ex rel. Reuther v. Sisson*, 101 Misc. 429, 167 N. Y. S. 134. Practically the same rule has been applied to fishing licenses: *State v. Pulsifer*, 129 Me. 423, 152 A. 711; *State v. Cote*, 122 Me. 450, 120 A. 538; to boxing licenses: *State ex rel. Orleans Athletic Club v. Louisiana State Boxing Commission*, 163 La. 418, 112 So. 31; to soft drink licenses: *Appeal of Bornstein*, 126 Me. 532, 140 A. 194; to milk licenses: *People ex rel. Lodes v. Dept. of Health*, 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894; to hack or carrier licenses: *Sylvania Busses, Inc., v. City of Toledo*, 118 Ohio St. 187, 160 N. E. 674; *Burgess v. Mayor and Aldermen of Brockton*, 235 Mass. 95, 126 N. E. 456; *Child v. Bemus*, 17 R. I. 230, 21 A. 539, 12 L. R. A. 57; to pool table licenses: *Commonwealth v. Kinsley*, 133 Mass. 578; and to teachers' licenses: *Stone, Supt., v. Fritts*, 169 Ind. 361, 82 N. E. 792, 15 L. R. A. (N. S.) 1147, 14 Ann. Cas. 295. As appears in these cases, the rule in many states is that such revocation may take place without notice or hearing, unless, of course, the statute provides otherwise.

Zugravu, 130 Ohio St. at 26-27. For 70 years, this lack of recognition remained unchanged. However, statutory requirements and conditions with regard to use and transfer of liquor licenses have changed. For example, the manner and form of the transfer of a liquor license from one to another have changed, including the sale of such license. See Section 4301:1-1-14 of the Ohio Administrative Code

(OAC) and *Abraham v. Fioramonte* (1952), 158 Ohio St. 213 (where liquor licenses could not be transferred to another individual because the liquor license was personal to the licensee).

The present state of Ohio law runs afoul to the mandate of the Fourteenth Amendment to the United States constitution. On the basis of *Brookpark*, Reveria has a legitimate claim of entitlement in its liquor license. As such, it has a property interest in the license, the deprivation of which must comport with procedural requirements in due course of law.

B. Right to a Hearing and a Meaningful Opportunity to be Heard Irrespective of the Occurrence of Election

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), citing *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531; also see *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914, *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, and *Grannis v. Oredean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes*, 407 U.S. at 80, citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187; 1191, 14 L.Ed.2d 62. As this Court in *Fuentes* mentioned –

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170--172, 71 S.Ct. 624, 647, 95 L.Ed. 817 Frankfurter, J., concurring).

If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' *Stanley v. Illinois*, 405 U.S. 645, 647, 92 S.Ct 1208,

1210, 31 L.Ed.2d 551.

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any),' *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E.g., *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90; *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; *Armstrong v. Manzo*, 380 U.S., at 551, 85 S.Ct., at 1191; *Mullane v. Central Hanover Tr. Co., supra*, 339 U.S. at 313, 70 S.Ct. at 656; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152--153, 61 S.Ct. 524, 535--536, 85 L.Ed. 624; *United States v. Illnois Central R. Co.*, 291 U.S. 457, 463, 54 S.Ct. 471, 473, 78 L.Ed. 909; *Londoner v. City & County of Denver*, 210 U.S. 373, 385--386, 28 S.Ct. 708, 713--714, 52 L.Ed. 1103. See *In re Ruffalo*, 390 U.S. 544, 550--551, 88 S.Ct. 1222, 1225--1226, 20 L.Ed.2d 117. 'That the hearing required by due process is subject to waiver, and is not fixed in

> form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie v. Connecticut, supra*, 401 U.S., at 378--379, 91 S.Ct., at 783 (emphasis in original).

Fuentes, 407 U.S. at 81-82.

The avenue taken by the court of appeals in this case, an avenue twice approved by Ohio Supreme Court, is that a property may be taken away when a certain event takes place, notwithstanding the availability of a remedy to correct a wrong upon adjudication subsequent to an election. The State's overriding interest in preserving the rule of the majority here is in contravention to the underlying purpose of the Bill of Rights. It is uncontroverted that the Bill of Rights, according to our Founding Fathers, was designed to protect "unpopular minorities from oppressive majorities." See *Feldman v. United States*, 322 U.S. 487, 501 (1944), citing 1 Annals 437.

The court of appeals takes the view that because election has taken place, any wrong committed before election must be corrected before election, no matter how soon the election was to occur subsequent to a party's discovery of the wrongful act. First, this is a cynical view of what is required under the due process clause, in that even tough a right to be heard is afforded, it is extinguished upon election day. Such a right is then illusory. Second, such a

cynical view is exacerbated when a party's attempt to timely exercise such a right is thwarted by the lack of action of the courts, the very institution whom the party turns to for redress.

In this particular case, the court of appeals justified its decision that Reveria's remedy of injunctive relief is moot because election had taken place. Further, according to the court of appeals, even if injunctive relief was an available remedy, it would still find that Reveria would be precluded relief on the grounds of laches, in that it waited two weeks after its protest was denied on September 23, 2003 before it filed its complaint, and over three weeks after the complaint was filed and before election was held on November 4, 2003. In the court of appeals' words, Reveria "did nothing to ensure that review of its protest would take place before the election." Reveria did, as a matter fact, sought review of its protest. After receiving and reviewing the transcripts on the September 9 and 23, 2003 hearings, Reveria filed its complaint on October 9, 2003 asking for injunctive and preliminary relief. Pursuant to Section (B)(1) of Rule 65, Injunctions, of the Ohio Rules of Civil Procedure (Civ.R.), "[n]o preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion." "In Ohio, an 'application for preliminary injunction may be included in the complaint or may be made by motion.'"[46] In accordance with *Hemberger*,

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[46]*Hemberger v. Labrae Board of Education*, 1997 WL 772939, unreported (11th Dist., Trumbull, Dec. 5, 19897), footnote 5, citing Civ.R. 65(B)(1).

it would have been duplicative for Reveria to file a motion asking for the same relief as those requested in the complaint. *Hemberger*, 1997 WL 772939, at *2, footnote 5. The Board was served with the complaint on October 10, 2003. The trial court never ruled on Reveria's application for relief until November 26, 2003, when the Magistrate ruled on the Board's motion for summary judgment.

The foregoing circumstances evince that Reveria's request for relief was set in motion well in advance of election day. Under its own rules, the trial court's failure to review Reveria's request for injunction, preliminarily and otherwise, not only denied Reveria a meaningful opportunity to be heard on its protest, but also it was denied of a hearing altogether on its request for equitable relief. Such a lack of hearing and a meaningful opportunity to be heard violated the due process clause of the Fourteenth Amendment to the United States Constitution.

It is interesting to note that the court of appeals cited a case in which a protest matter was judicially reviewed even after an election. *Prince v. Franklin County Board of Elections*, 1998 WL 894724, unreported (10th Dist., Franklin, Dec. 24, 1998). Despite such a holding, the court of appeals insisted that all protest matters must be brought and *resolved* before an election is held. The right to due process under the Fourteenth Amendment would be meaningless where a licensee found out the day before election that a petition was being circulated to vote a precinct dry. See *Miles & Lee Market, Inc. v. Cuyahoga Board of Elections*, 1995 WL 116956, unreported (8th Dist., Cuyahoga, Mar. 16, 1995). For all practical purposes, it is not difficult to imagine that it

would have been futile for the store owner in *Miles & Lee Market, Inc.* to seek from a court one day before election. How can one be guilty of laches?

CONCLUSION

Petitioner respectfully request that the writ be issued. The questions presented by this petition are of utmost concern with regard to judicial review on the availability of equitable relief subsequent to an election. Further, they concern whether one may seek relief when the very institution from whom an aggrieved party seeks relief has violated such party's right to a hearing under the due process clause. Counsel has been unable to uncover any law that stands for the proposition that it is, or is not, a violation of due process to hold, or not hold, a hearing and/or to provide, or not provide, a remedy on a pre-election protest subsequent to an election. Thus, several issues herein may be of first impression that are ripe for review. Notwithstanding, specifically, the failure to conduct a hearing prior to and subsequent to the election was a violation of Reveria's constitutional rights.

Dated: Akron, Ohio, 10-11-05.

Respectfully,

Robert C. Meeker

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330-253-3337

Counsel for Petitioner
REVERIA TAVERN, INC.

PROOF OF SERVICE

Pursuant to Rules 12 and 29 of the Rules of the Supreme Court of the United States, the undersigned counsel hereby certifies that three (3) copies of the Petition for Writ of Certiorari was served upon the following at his/her/its/their last known address(es), by regular United States Mail, first class, postage prepaid, on the date indicated below:

SANDY J. RUBINO, ESQ.
Chief Assistant Prosecuting Attorney
Civil Division
Summit County Safety Building
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Attorney for Respondent
SUMMIT COUNTY BOARD OF ELECTIONS

Dated: Akron, Ohio, 10-11-05.

Respectfully,

Robert C. Meeker

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APPENDIX

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

REVERIA TAVERN, INC.,	)	CASE NO.
	)	CV 03 10 5849
Plaintiff,	)	
	)	JUDGE SPICER
-vs-	)	MAGISTRATE
	)	SHOEMAKER
SUMMIT COUNTY	)	
BOARD OF ELECTIONS,	)	**MAGISTRATE'S**
et al.,	)	**DECISION**
	)	
Defendants	)	

To the Honorable Mary F. Spicer of the Court of Common Pleas, Summit County, Ohio:

Pursuant to Civil Rule of Practice 53, Local Rule of Practice 18, and the Order of Reference made in this case, the Magistrate reports this decision to the Court, based upon the evidence and exhibits adduced at the hearing on this matter.

This matter came on for review by the Magistrate as a result of a hearing conducted before him on November 24, 2003 and documents submitted.

FINDINGS OF FACT

(1) On November 24, 2003 counsel for the Plaintiff

presented oral arguments in regard to their respective position and also agreed to the authenticity of certain documents for consideration by the Magistrate in this matter. In short, Plaintiff seeks to have the Summit County Board of Elections ("Board") not certify an election result from a local option proposed.

(2) In brief history, Plaintiff, Reveria Tavern, Inc. ("Reveria"), operates a tavern at 782 Lovers Lane, Akron, Ohio 44306 under the name "Belmont Grille," under a Department of Liquor Control Permit which is issued to the operation in Ward 7, Precinct I. Prior to the November 2003 elections a local option petition was circulated to place the tavern operation on the ballot. This petition was circulated and turned in to the Board, which thereafter placed the local option regarding the Plaintiff's business on the November 2003 ballot. The voters in that respective area returned their decision in favor of "drying up" Plaintiff's business. Currently pending before the Board is their decision to certify the election results to state officials in Columbus which will no doubt result in the Ohio Department of Liquor Control's order to the Plaintiff to cease and desist selling alcoholic beverages under the license issued to the Plaintiff in the dried-up area.

(3) Knowing that such matters were pending, on October 9, 2003 the Plaintiff, in order to stop such action, filed his complaint seeking, in the alternative: (a) a Writ of Mandamus; (b) a Writ of Prohibition; or (c) injunctive relief.

(4) Prior to such filing , Plaintiff, being informed of the proposed action undertaken to dry up its business,

attended by its attorney on September 9, 2003 a "protest" hearing before the Board to protest the proposed activity. No decision was made as a result of the hearing on September 9 and the matter was reconvened on September 23, 2003. Such actions are scheduled to allow affected tavern owners to present their position prior to the election. Plaintiff's counsel appeared at both hearings. Again Plaintiff corporation appeared through its counsel. The transcripts of both hearings were provided and filed as part of the record of these matters.

(5) On October 27, 2003 the Defendants filed their motion for summary judgment which was responded to by the Plaintiff on November 17, 2003.

(6) The first defect alleged by the Plaintiff in count one of its complaint (paragraphs 27-40) is a claimed violation of R.C. 3501.38(C). Plaintiff contends that the petition circulator, David Paul Reyman, had in violation of such statute himself written out in the petitions on a number of occasions the designation of the county of residence and the time of signing of the petition by various persons who did in fact sign the petition. The statements presented at the Board hearings, as well as acknowledgments by the Defendants' counsel reflect the fact that Mr. Reyman in fact did acknowledge that he had on a number of occasions inserted the date of signing of the petition and the county of residence. There is no evidence that any act undertaken by Mr. Reyman on his behalf had been approved or otherwise done at the request of the signer of the petition. R.C. 3501.38(C) does provide that the information required to be filled out in such petition by the signer of such petition does

in fact include the county of residence and the date that the person signed the petition. R.C. 3501.38(C) uses the mandatory or obligatory word "...shall..." in regard to these duties. This subject was addressed by Plaintiff to the Board on September 9 and 23, 2003.

(7) The second count of Plaintiff's complaint (paragraphs 41-61) alleges a violation of R.C. 4301.33(A). Such violations are claimed to be violative of the due process clause under the Fifth and Fourteenth Amendments to the United States Constitution. In substance, the Plaintiff alleges that it never received the required notice which it says was mandated by R.C. 4301.33. The clear language of that statutory section obliges and requires the circulator of the petition, which in this case was Mr. Reyman, to send a notice of his intention to all the permit holders, which in this case was the Plaintiff, by certified mail. There is no dispute that the contents of the actual envelope notifying the Plaintiff of the intended activities was legally correct. The dispute is whether the actual notice of such was ever provided or otherwise delivered as required by statute to the Plaintiff. R.C. 4301.33 uses the obligatory language that the circulator "...shall ...notify b certified mail ...(Plaintiff)...".

(8) In regard to the immediate foregoing, the evidence presented on November 24, 2003 does establish that in fact a certified letter bearing the return address of Mr. Reyman was put in the U. S. Postal Service an that the U. S. Postal Service attempted to deliver the certified letter on July 24, 2003 and a second time on July 29, 2003. It is readily apparent from the notations placed by the Postal Service on the envelope that the certified letter was returned unsigned

by the intended recipient and that the Postal Service determined that such action was "unclaimed." There was some testimony presented by Mr. Reyman before the Board that it was his belief that the activity of the Plaintiff in not accepting the letter was a refusal. Clearly there was no testimony supporting such concept, the only information available as valid evidence is that the Postal Service returned the envelope to the sender with the notation "unclaimed."

(9) Likewise, the certified letter was addressed not to the Plaintiff, "Reveria Tavern, Inc.," but with the misnomer of "Riveria Tavern, Inc.' Here again, these matters were addressed to the Board by Plaintiff on September 9 and 23, 2003.

(10) Plaintiff's count three found in paragraphs 62-77 alleges a violation, again of R.C. 4301.33(B), alleging such violation as violative of the due process clause under the Fifth and Fourteenth Amendments to the United States Constitution.

(11) At the conclusion of Plaintiff's complaint the prayer for relief is addressed in nine paragraphs. Certain of those paragraphs are mooted by the passage of time, that is, the request that the election not take place is no longer applicable inasmuch as the actual election has been undertaken and the results turned over to the Board. Paragraph 1 of the prayer for relief appears to request the Court to grant some sort of judgment, order, writ or decree to declare the petitions which are addressed above, invalid and null and void. That paragraph addresses count one. In paragraph 40 of count one Plaintiff has specifically

requested relief under the concept of a Writ of Mandamus or Writ of prohibition. There was no evidence presented in this matter that either the extraordinary Writ of mandamus or Writ of Prohibition can be utilized as Plaintiff apparently seeks in paragraph 1 of its prayer as a means to have the Board revisit its decision of September 23, 2003 and to evaluate and declare the aforementioned petitions invalid, null or void. The record is quite clear that the Board on September 23, 2003 voted to deny Plaintiff's protest. No appeal to that decision has been filed.

(12) Paragraph 2 of the prayer at least in part is relevant inasmuch as it seeks to address count one in regard to the certification question, currently pending before the Board.

(13) Paragraph 3 of the prayer addresses count two, again asking that the Court declare the petitions invalid, null and void, however, a review of count two in paragraph 61 specifically sets forth that the Plaintiff is seeking a remedy under the basis of a Writ of Mandamus and/or a Writ of Prohibition. Here again there has been no evidence presented as to how a Writ of Mandamus or a Writ of Prohibition can be used as either some sort of appeal of the September 23, 2003 decision to evaluate a claimed violation of R.C. 4301.33(A) as violative of the due process clause under the Fifth and Fourteenth Amendments to the United States Constitution.

(14) Paragraph 4 of the prayer more precisely addresses count two, seeking to again have the Court make a ruling on the basis of a writ or a decree to prevent the

Board from certifying the question, ostensibly, for the certification question currently pending before the Board. Placing the matter on the ballot as addressed in paragraph 2 of the Plaintiff's prayer is now moot because the election has already been held.

(15) Plaintiff's paragraph 6 in its prayer for relief addressing count three as it does is a repetitive statement of the aforementioned claims for relief; however, those are being made under count three as opposed to counts one and two.

(16) Paragraph 7 of the Plaintiff's prayer appears to be an actual request for a temporary restraining order and/or a preliminary injunction, again to preclude the Board from certifying the results of the election until the Plaintiff has been given an adequate opportunity to protest the matter on the merits.

CONCLUSIONS OF LAW

(1) It is first of all concluded that the request for the issuance of a Writ of Prohibition is inappropriate under the circumstances of this matter. Writs of Prohibition are extraordinary judicial writs issued generally out of a court of superior jurisdiction to prevent an inferior court or a "tribunal" from usurping jurisdiction and/or to undertake an act which it is not legally entitled to do. It has sometimes been said that a Writ of Prohibition is an extraordinary remedy, the function of which is to prevent judicial or a quasi judicial tribunal from acting. The question is whether the Board, in undertaking to certify the election, is acting in

a quasi judicial capacity.

(2) Thus, in substance, a determination must be made as to whether the Board, in exercising its authority to certify the election results in this instant matter to Columbus is acting as a judicial tribunal or otherwise exercising quasi judicial authority in passing on the certification question. It is readily apparent and it must be so concluded, that the Board has no judicial authority in regard to this matter, and the Board clearly is not exercising quasi judicial authority as a tribunal in making a decision to certify the election results to Columbus. The Board in undertaking such certification action will only be undertaking an administrative act as it is empowered, and to report the results of that administrative act, that being the certification of the election, to the appropriate authorities in Franklin County, Columbus, Ohio. Such matters are beyond the cognizance of a Writ of Prohibition. A Writ of Prohibition cannot be used as a substitute for an R.C. 2506.01 appeal ruling which is available if properly established by the evidence, to remand to a board, bureau or commission, etc. a decision previously made to rethink such, or in the alternative, to set such decision aside as invalid.

(3) Additionally, it cannot be concluded that a Writ of Mandamus, which obliges a public officer or public body in relation to the performance of official or public duties to perform an act which the body or public official has unjustifiably refused to undertake.

(4) An action in Mandamus in theory may have been applicable in this matter prior to the actual

commencement and completion of the election. Now that the election has been accomplished and the results returned to the Board, there is no obligatory duty upon a Writ of Mandamus that would issue and the theory of the Plaintiff's case. Rather, the Plaintiff is seeking not to compel the Board from currently undertaking any action, but seeking to prevent the certification of the election results and stopping the Board from undertaking such activity and forwarding the same to Columbus. Likewise as addressed above, a Writ of Mandamus cannot be used as a means to evaluate the activities and the propriety of a decision duly made by the Board in the protest hearings conducted before the Board on September 23, 2003. Plaintiff was given ample opportunity to appear at such hearings and present its protests. Whether the Board in hearing those protests acted in accordance with the law when it denied Plaintiff's protest is not a subject of review by means of a Mandamus.

(5) Lastly, it is specifically concluded that injunctive relief in the present scenario is inappropriate. Plaintiff's obvious contentions in this matter are that the Board failed to properly act in regard to its presentation of the problems of improper circulation of petitions and/or notice. These matters were clearly addressed to the Board at the two protest hearings. Again, whether the Board properly acted in regard to those presentations by its decision on September 23, 2003 and should have precluded the election from going forward are not matters subject to review by the means of a temporary, restraining order and/or a preliminary injunction. Plaintiff's paragraph 7 in its prayer for relief presume that the Plaintiff should be given additional time in regard to these matters, which would be granted by

injunctive relief, to allow the circumstances of the petition matter and the notice matter to be evaluated. However, there is no current pending claim in the Plaintiff's complaint which would grant or otherwise allow the type of review Plaintiff seeks, that is, compelling the Board to rethink its September 23, 2003 decision.

(6) Further, Plaintiff 's counts two and three alleges violations of the due process clause in the Fifth and Fourteenth Amendments to the United States Constitution. The claim of the Fifth Amendment violation - to be deprived of life, liberty and property -- is obviously a right of entitlement to corporate entities as well as citizens. The holder of a liquor permit based upon existing law, may well have a property right which cannot be removed without appropriate due process of law. However, Plaintiff's presentation of its claims does not allow for such a review if in fact one is warranted under the second count of the Plaintiff's complaint, nor of the third count of the Plaintiff's complaint. In short, while Plaintiff may have viable claims for violation of the Fifth and Fourteenth Amendments to the United States Constitution as set forth in counts two and three of his complaint, such actions cannot be addressed under Writs of Prohibition, Writs of Mandamus and/or the use of equity powers as currently configured in the Plaintiff's complaint.

(7) As such, it is determined that the Plaintiff's request for the issuance of a Writ of Prohibition, which was primarily sought on November 24, 2003, is found to lack evidentiary matters in support thereof, as does any claim for the issuance of a Writ of Mandamus and/or for the issuance

of any equity order declaring and otherwise enjoining the Board from certifying the election results in regard to the Plaintiff's complaints. It is specifically pointed out that this decision shall not be construed as making any substantive ruling on Plaintiff's claims or on Defendants defenses to such. This decision solely addresses and states that the means sought to evaluate such matters are procedurally defective.

(8) It is the recommendation of the Magistrate that the Magistrate's Decision herein should be treated as a permanent order, pursuant to R.C. 53(E)(4)(c).

(9) The parties and/or their counsel are specifically warned and noticed hereby that a party may not assign an error on appeal the adoption by the trial court of any finding of fact or conclusion of law set forth herein unless a specific objection is first made to the trial court pursuant to Civ.R. 53.

It is so decided.

/s/ John H. Shoemaker
MAGISTRATE JOHN H. SHOEMAKER

cc: Attorney Robert C. Meeker
Attorney Sandy Rubino

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

REVERIA TAVERN, INC.,	)	CASE NO.
	)	CV 03 10 5849
Plaintiff,	)	
	)	JUDGE SPICER
-vs-	)	
	)	**ORDER**
SUMMIT COUNTY	)	
BOARD OF ELECTIONS,	)	
et al.,	)	
	)	
Defendants	)	

This matter comes on for the Court's independent review and analysis of the issues, appropriate rules of law, applicable to the issues in this case, and the Court's review and analysis of the Magistrate's Decision filed in this case pursuant to Civ.R. 53(E) on November 26, 2003.

This Court finds that Plaintiff, Reveria Tavern, Inc. ("Reveria Tavern") has caused objections to be filed to the Magistrate's Decision filed pursuant to Civ.R. 53(E). The Court further finds that Defendant Summit County Board of Elections ("Board of Elections") has filed a reply brief to Reveria Tavern's objections. The Court has considered the Magistrate's Decision, Reveria Tavern's objections and the Board of Elections' reply.

This action arises out of Reveria Tavern's efforts to obtain a Writ of Mandamus, a Writ Prohibition and/or Injunctive Relief to prevent the Board of Elections from holding an election on issues for the sale of beer, spirits and liquor in Ward 7, Precinct I, Akron, Ohio, on the grounds that statutory and constitutional defects occurred with the petitions circulated by Dave Reymann and with related hearings.

The timetable of events for this action is as follows: Reveria Tavern filed its complaint on October 9, 2003. On October 27, 2003, the Board of Elections filed a motion for summary judgment. The election was held on November 4, 2003. The Magistrate held a hearing on the motion on November 24, 2003. The Magistrate filed his Decision on November 26, 2003. The Board of Elections certified the election results on or about December 2, 2003.

The Magistrate, in his Decision, determined that the Reveria Tavern's complaint was procedurally defective, such that certain of Reveria Tavern's claims for relief were inappropriate and/or moot because the election had been held. Reveria Tavern raises two errors of law:

1. The Magistrate erred in finding that the Board's decision was final and appealable under R.C. 2506.01 and, therefore, Plaintiff was without an adequate remedy in the ordinary course of the law; and

2. The Magistrate erred in finding that a Writ of Prohibition, a Writ of Mandamus, or injunctive relief, was not available to Plaintiff to prohibit the Board from

certifying the result of the election.

First Assignment of Error

1. Writ of Prohibition

Reveria Tavern first argues in its brief that the Magistrate erred in finding that it was without power to grant relief as prayed for in paragraph 9 of its prayer for relief, as contained in its complaint pursuant to R.C. 2506.01. The Board of Elections does not disagree with Reveria Tavern's argument that the Magistrate did err in finding that Reveria Tavern's remedy to stop certification of the local liquor option election result was subject to appeal under R.C. Chapter 2506. Upon review of this issue, the Court concludes that the Magistrate did err in finding that Reveria Tavern's relief was by way of appeal.

Second Assignment of Error

Reveria Tavern argues that the Board exercised quasi judicial authority when it denied its protest after holding evidentiary hearings on September 9 and 23, 2003. Reveria Tavern contends that the Magistrate made clear that Board's denial was unauthorized by law. Reveria Tavern concludes that because the Board exercised quasi judicial authority, it did not have any other remedy of law available, and a writ of prohibition was available to it to prohibit the Board from certifying the election results.

In order to obtain a writ of prohibition, relators must establish that (1) the board is about to exercise judicial or

quasi judicial power, (2) the exercise of that power is legally unauthorized, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St.3d 289, 291, *State ex rel. Harbarger v. Cuyahoga County Board of Elections* (1996), 75 Ohio St.3d 44. A protest hearing in election matters is a quasi judicial proceeding. *State ex rel. Thurn.* Thus, in *State ex rel. Harbarger*, the Court found that a protest hearing in election matters sufficiently establishes the first requirement for a writ of prohibition.

However, in this matter, the election had occurred by the time that the issue came before the Magistrate, and was thus moot. Therefore, the Magistrate correctly focused his consideration upon whether the Board was acting in a quasi judicial function in undertaking to certify the election. The Magistrate concluded that the Board of Elections did not have judicial authority, and was not exercising quasi judicial authority in making a decision to certify the election results to Columbus.

The Board of Elections argues that the act of certifying election results to the Secretary of State is a duty imposed upon the Board by law and does not involve the exercise of discretion, and thus does not meet the second condition permitting a Writ of Prohibition (requiring the exercise of such power is unauthorized by law). The Court finds that the Magistrate did not err as a matter of law in finding that the Board was not exercising quasi-judicial authority as a tribunal in making a decision to certify the election results to Columbus.

As to the third condition required to have a writ of prohibition, the Board of Elections argues that Reveria Tavern was not without an adequate remedy of law as Reveria Tavern did have a protest hearing concerning its substantive complaints regarding the validity of the petitions and did not seek extraordinary relief or injunctive relief prior to the election. The Court agrees.

The Court finds that the Magistrate did not err in finding that a writ of prohibition was an inappropriate remedy to preclude the Board from certifying the election.

2. Writ of Mandamus

Reveria Tavern argues that the Magistrate erred in failing to prohibit the Board of Elections from certifying the elections results when it had the opportunity to do so prior to December 2, 2003. Reveria Tavern further argues that it has a clear legal right to a decertification where the results have not been certified by the Secretary of State.[1]

The Magistrate concluded that an action in Mandamus might have been applicable in this matter prior to the actual commencement and completion of the election, but after the election had been accomplished and the results returned to

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[1]Reveria Tavern also argues that the Magistrate found the word "shall" in R.C. 3501.38(C) and R.C. 4301.33 is mandatory and obligatory. The Court finds that the Magistrate stopped short of making such a determination, and finding specifically that he was not making any substantive ruling on Reveria Tavern's claims.

the Board, there is no obligatory duty upon a Writ of Mandamus would issue.

The Board of Elections argues that a Writ of Mandamus cannot be issued to overturn an election result. Mandamus is used to compel the performance of a clear legal duty and where there is no legal duty and where there is no adequate remedy in the ordinary course of law. *State ex. Rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42. The Board of Elections argues that it has a clear legal duty to certify the results of the elections pursuant to R.C. 3501.11(L). ,

The Court finds that the Magistrate did not err in finding that a writ of mandamus was not an appropriate means by which to evaluate the propriety of a decision duly made by the Board in the protest hearings conducted before the board in September 2003. Further, as the election results have been certified, this objection, in effect, has been rendered moot.

3. Further Relief which the Court deems reasonable and proper

Reveria Tavern argues that the Magistrate incorrectly found that Reveria Tavern's prayers for relief have been rendered mooted because the election has already been held and that the matters in Reveria's complaint were matters that should have been appealed. Reveria Tavern further argues that the claims far relief were not mooted since certification had not yet taken place.

As previously stated, the Board of Elections did certify on or about December 2, 2003. Therefore, this issue has been rendered moot. However, the Court finds even if these issues were not rendered moot, the Court finds no error in the Magistrate's conclusions.

Summary

In summary, the Court finds Reveria Tavern's objections as to the appeal ability of the election result under R.C. Chapter 2506 is granted. However, Reveria Tavern's remaining objections are not well taken and are DENIED. Therefore, the Court adopts the Magistrate's Decision filed November 26, 2003.

This is final, appealable Order.

It is so ordered.

JUDGE MARY F. SPICER

cc: Attorney Robert C. Meeker
Assistant Prosecutor Sandy J. Rubino
Magistrate John Shoemaker

STATE OF OHIO	)	IN THE COURT OF
	)ss:	APPEALS
COUNTY OF SUMMIT	)	NINTH JUDICIAL DISTRICT

REVERIA TAVERN, INC. Appellant v. SUMMIT COUNTY BOARD OF ELECTIONS, et al. Appellees	C.A. Nos. 21893 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, CASE No. CR 2003 10 5849

DECISION AND JOURNAL ENTRY

Dated: December 15, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} This matter is before this Court on appeal from the judgment of the Summit County Common Pleas Court upholding the magistrate's finding that appellant Reveria Tavern, Inc. ("Reveria") was not entitled to injunctive relief

that would have prevented the Summit County Board of Elections (the "Board") from certifying the election results in a referendum placed on the ballot for the general election on November 4, 2003, on the issue of whether to eliminate the sale and consumption of beer and spirituous liquor in Ward 7, Precinct I in the City of Akron. For the following reasons, this Court finds that the Summit County Common Pleas Court properly denied appellant's motion for relief and affirms its judgment.

I.

{¶2} Appellant Reveria, dba Belmont Grille, is a restaurant serving beer and spirituous liquor in Ward 7, Precinct I ("Akron 7-I") in the City of Akron under a liquor license issued by the Ohio Division of Liquor Control.

{¶3} David P. Reymann ("Mr. Reymann") was the petitioner and circulator of local option election petitions. In late July and early August 2003, Mr. Reymann and another circulator circulated a petition for election on the question of the sale of beer by C and D permit holders pursuant to part-petitions under R. C. 3501.38, 4305.14 and 4305.15.[1] The petition was circulated for the purpose of placing on the ballot in the general election the issue of whether the sale of

[1]Apparently, there were two local option petitions circulating for the purpose of placing two questions on the ballot which affected appellant's liquor license.

spirituous liquor should be permitted in Akron 7-I.[2]

{¶4} Appellant protested the validity of the petitions before appellee Board. Appellee Board held a hearing on September 9, 2003. Appellant contends that two issues were presented to appellee with respect to the validity of the part-petitions. The first issue was whether appellee complied with R.C. 3501.38(C) by certifying the petitions. This section requires each person who signs to fill in the name of the city, county and date when he signs the petition. Mr. Reymann admitted that he filled in many of the city, county and date blanks which the person signing failed to fill in. He further admitted that he did not fill them in while in the presence of the person signing.

{¶5} The second issue raised in the protest is whether appellee complied with R.C. 4301.33(A) regarding the manner in which appellant was notified of the petitions. Appellant argues that he did not receive proper notice because the certified mail Mr. Reymann sent misspelled appellant's name. Further, appellant contends he never received ,the certified mail. The notations on the certified mail indicated "unclaimed" and "other." There was a question whether the term "refused" would have been indicted on the envelope if appellant refused to accept delivery of the certified mail.

{¶6} At the hearing, appellant argued that appellee stated that it would undertake to investigate the

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[2]Appellant asserts that Mr. Reymann specifically targeted Reveria with the intent to oust it from Akron 7-I.

circumstances regarding the certified letter. Appellee continued the hearing to September 23, 2003, in order to allow it time to investigate the certified letter and request a prosecutor's opinion regarding the requirements of R.C. 3501.38(C) and 4301.33.

{¶7} At the hearing continued to September 23, 2003, appellee apparently failed to investigate the circumstances regarding the certified letter. Appellee refused to grant appellant additional tine to conduct its own investigation. At the conclusion of the hearing, appellee voted to reject appellant's protest.

{¶8} On October 9, 2003, appellant filed a complaint for writ of mandamus, writ of prohibition and injunctive relief in the Summit County Common Pleas Court. The Common Pleas Court assigned the matter to a magistrate. On October 27, 2003, appellee filed its motion fob summary judgment and on November 17, 2003, appellant filed its response.

{¶9} During that time, the election was held on November 4, 2003, and the voters voted to "dry up" Akron I-7.

{¶10} The magistrate heard the motion for summary judgment on November 24, 2003, and issued his decision on November 26, 2003, denying appellant's request for relief. The magistrate found that the writ of prohibition and the writ of mandamus were not appropriate vehicles to compel appellee to review its decision upholding the validity of the petitions because the election had already been held.

The magistrate also considered what actions the appellant was permitted to take after the election had been held. The magistrate found that the writ of prohibition would not apply because appellee was not exercising a quasi-judicial function in certifying the election results.

{¶11} The magistrate likewise found that a writ of mandamus could not be used after the election has been held because the writ only applies to actions appellee is legally required to take.[3] In this case, the magistrate found that appellant was not seeking to compel appellee to perform any task, but was attempting to prevent it from certifying the election. Hence, the writ would not apply.

{¶12} Finally, the magistrate concluded that injunctive relief was not an appropriate means to review the protest. In conclusion, the magistrate found that appellant pursued procedurally defective means to evaluate the merits of its claims.

{¶13} On December 2, 2003, appellee certified the election results.

{¶14} On December 8, 2003, appellant objected to the magistrate's finding and appellee responded. The trial court issued an order on December 22, 2003, upholding the

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[3]The magistrate noted that a writ of mandamus may have been available to appellant prior to the election to prevent appellee from placing the referendum on the ballot because of the invalid petitions.

magistrate's decision.[4] The trial court found that the writ of prohibition may have applied to appellee's denial of appellant's protest, but that it was not available once the election was held. The court also found that a writ of prohibition could not be applied to appellee's act of certifying the election because appellee was not acting in a quasi judicial function. With respect to other claims for relief, including the request for injunctive relief, the trial court agreed with the magistrate that appellee's certification of the election results on December 2, 2003, rendered appellant's other claims for relief moot.

{¶15} On January 9, 2003, appellant filed a motion for stay of order and the trial court granted the motion. The Ohio Secretary of State is withholding its certification of appellee's certification of the election results pending this Court's resolution of appellant's claims.

II.

{¶16} Appellate courts review the grant of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. *The Beacon Journal Publishing Co. v. Summit Cty. Bd. of Elections* (April 8, 1998Í,), 9th Dist. No. 18182. Accordingly, an appellate court "review[s] the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion."

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[4]Both parties and the trial court agreed that the magistrate erred in finding that the appellant's remedy to stop certification of the election result was subject to appeal under R.C. 2506.

Am. Energy Serv. Inc. v. Lekan (1992), 75 Ohio App.3d 205, 208. Under Civ.R.56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶17} The party seeking summery judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Any doubt is to be resolved in favor of the nonmoving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶18} Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Dresher*, 75 Ohio St.3d at 293. Once this burden is satisfied, the nonmoving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material

that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735. Pursuant to Civ.R. 56(C), only certain evidence and stipulations, as set forth in that section, may be considered by the court when rendering summary judgment. Specifically, the court is only to consider "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R.56(C).

III.

{¶19} In this case, appellant assigns one error to the magistrate's finding.

ASSIGNMENT OF ERROR

"THE MAGISTRATE ERRED AS A MATTER OF LAW IN FAILING TO PASS UPON REVERIA TAVERN, INC.'S SUBSTANTIVE CLAIMS AND IN FAILING TO GRANT INJUNCTIVE RELIEF THAT WOULD HAVE PREVENTED THE SUMMIT COUNTY BOARD OF ELECTIONS FROM CERTIFYING THE ELECTION RESULTS BASED ON VIOLATION OF ELECTION LAWS AND REVERIA TAVERN, INC.'S STATUTORY AND CONSTITUTIONAL RIGHTS."

{¶20} In this case, appellant argues that it is entitled to injunctive relief as a remedy to contest a decision of appellee on a protest matter. Appellant argues that injunctive relief is necessary to enjoin appellee from certifying the results of the November 4, 2003, election until

its protest matter is properly resolved. Appellant claims that a remedy is necessary because it is precluded from filing an election contest for matters that should have been corrected by pre-elections remedies.[5] Appellant claims that injunctive relied is an appropriate remedy which may be used to prevent appellee from certifying the election results.

{¶21} Generally, the decisions of a board of elections on protest matters are final. Appellant acknowledges that election board decisions are not subject to appellate review. See Ohio Rev. Code., Ann Section 3513.262;[6] *State ex rel. Beck v. Casey* (1990), 51 Ohio St.3d 79, 80; *State ex rel. Moss v. Franklin Cty. Bd. of Elections* (1980), 69 Ohio App. 2d 115. 117. ("[T]he determination of a board of elections with respect to a protest against a nominating petition is not appealable.")

{¶22} A board of election's determinations on protest matters, however, are reviewable for allegations of fraud, corruption, abuse of discretion or clear disregard of statutes or applicable legal provisions. *State ex rel. Ruehlmann v. Luken* (1992), 65 Ohio St.3d 1, 2; *State ex rel.*

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[5]There is no question that pre-election matters that should have been raised in a protest cannot later be brought in an election contest procedure. *Portis v. Summit Cty. Bd. of Elections* (1993), 61, Ohio St.3d 590.

[6]Ohio Revised Code 3513.2612: "They [the election board] shall also forthwith mail notice of the time and pace fixed for the hearing to the person who filed the protest. At the time fixed, such election officials shall hear the protest and determine the validity or invalidity of the petition. Such determination shall be final."

White v. Franklin Cty. Bd. of Elections (1992), 65 Ohio St.3d 5, 8.

{¶23} In most cases, review of board of election's determinations in protest matters is made by either writ of mandamus or writ of prohibition. Appellant's complaint requested relief under both these writs. In this case, appellant also argues that injunctive relief is appropriate.

{¶24} This Court finds that injunctive relief may have been available as a vehicle to enjoin the board of elections from placing issues raised in protests on the ballot. See *Kelli Joe, Inc. v. Cuyahoga Cty. Bd. of Elections* (June 9, 1992), 10th Dist. No. 91AP-1421; *Prince v. Franklin Cty. Bd. of Elections* (Dec. 24, 1998), 10th Dist. No. 98AP- 495; *Miles & Lee Mkt., Inc. v. Cuyahoga Cty. Bd. of Elections* (Mar 16, 1995), 8th Dist. No. 67105.

{¶25} The issue, however, is not limited to whether injunctive relief may have been available to review appellee's determination on a protest matter. This Court must also determine whether injunctive relief is available on a protest matter after an election has been held.

{¶26} Appellee argues that there is no relief – either by way of prohibition, mandamus or injunction – that is available once the election has passed.

{¶27} Appellant argues that injunctive relief is not rendered moot after the election. It argues that injunctive relief can appropriately be used to enjoin the Secretary of

State and the Division of Liquor Control from certifying the results of the election until a review can be made of its protest complaints. In support, it cites the case of *Miles & Lee Mkt. Inc., supra.*

{¶28} In *Miles & Lee Mkt., Inc.*, a store holding a liquor permit found out the day before the election that a man Was circulating a petition to "dry out" the precinct in which the store was located. The owner of the store contacted the Board of Elections and was told it wad too late to isle a protest, but that he could pursue post-election remedies. The election was held the next day, November 2, 1993, and the electors voted the precinct "dry."

{¶29} On November 18, 1993, the store owner filed suit contesting the election on the grounds that the purpose of the election petition was misrepresented to the electors. The suit sought declaratory and injunctive relief against the board of elections, the Department of Liquor Control and the Secretary of State.

{¶30} The trial court granted the board's motion for summary judgment and denied the store owner's request for a preliminary injunction to prevent certification of the results, and the results were certified on November 29, 1993. The court, however, restrained the Department of Liquor from canceling the store owner's permit.

{¶31} On appeal, the Eighth District held that a "suit for declaratory and injunctive relief is an available remedy to contest a decision of the Board of Elections on a protest matter for allegations of fraud, corruption, abuse of

discretion or disregard of a statute," *Miles & Lee Mkt. Inc.*, citing *State ex rel. Beck v. Casey* (1990), 51 Oho St.3d 79 and *Kelli Joe, Inc.* The Eighth District found the store owner guilty of laches and upheld the trial court's granting of summary judgment in favor, of the board. Appellant argues that this case illustrates that injunctive relief is available on a protest matter even after an election is held.

{¶32} This Court has found two other cases dealing with the issue of whether injunctive relief is available to review an election board's decision in a protest matter after an election has been held. In *Kelli Joe, Inc.*, *supra*, petitions were filed with the board of elections on August 15, 1990, to "dry up" a precinct in which the plaintiff operated a nightclub. The operator filed a protest on September 4, 1990, with the board questioning tie validity of some signatures. At the hearing on September 13, 1990, the board invalidated some signatures, but held that the petitions were valid. The election was held on November 6, 1990, and the electors voted to "dry up" the precinct.

{¶33} On November 21, 1990, the operator filed suit against the board of elections, the Secretary of State, and the Director of the Ohio Department of Liquor Control seeking declaratory and injunctive relief declaring the election void and seeking an injunction to enjoin the defendants from certifying the results. The basis of the suits was the operator's allegations that the board failed to comply with the petition protest provisions.

{¶34} The defendants moved to dismiss the complaint for, inter alia, failure to state a claim, and the trial

court grated the motion.

{¶35} On appeal, the Tenth District upheld the trial court's granting the motion to dismiss for failure to state a claim. The Tenth District noted that the operator had taken no further action on the denial of his protest until after the election and made no claim that the election was improperly conducted. The court found that R. C. 4301.391[7] did not permit the consideration of any pre-election procedures. The operator had failed to challenge the board's resolution and could not raise such issues post-election. The court therefore upheld the trial court's finding that it did not have jurisdiction to consider the operator's claim.

{¶36} The last case dealing with injunctive relief in protest matters after an election has been held is Princes supra. In *Prince*, the plaintiff filed a protest with the board of elections on February 26, 1998, alleging that there were non-signatures on the part-petitions. The board denied the protest.

{¶37} On March 16, 1998, plaintiff filed an action in court seeking to enjoin the board from placing the issue in the petitions on the ballot. On March 28, 1988, the

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[7]R.C. §4301.391 states that "[n]o permit premises shall remain in operation inconsistent with the results of a local option election after the thirty day period set forth in section 4301.39 of the Revised Code and no court other than in a recount or election contest shall suspend or ho id in abeyance any restriction or cancellation brought about by a local option election pursuant to sections 4301.32 to 4301.41, inclusive, and 4305.14 of the Revised Code."

Magistrate found that plaintiff was not entitled to injunctive relief and on April 21, 1998, the trial court upheld the magistrate's rulings over plaintiff's objections.

{¶38} On appeal, the Tenth District held that Ohio law requires strict adherence to the requirements for signatures. Id. at *3. The Tenth District reversed the trial court and remanded the matter back to the board to determine whether excluding the signatures on the invalid part-petitions rendered it insufficient to be placed on the ballot. Id. at *5 The court also found that the trial court's failure to grant injunctive relief was rendered moot based on the court's determination on the first assignment of error. Id.

{¶39} At the time the Tenth District heard the appeal, the election had already been held and the results sealed pursuant to order of the court. Despite this fact, the court permitted the protest matter to be considered even after the election had been held.

{¶40} This Court finds that protest matters must be brought and resolved before an election is held, or else they are rendered moot and no further remedy is available. *State ex rel. Hills Communities, Inc. v. Clermont Cty. Bd. of Elections* (2001), 91 Ohio St.3d 465, 467. ("As we have repeatedly held, prohibition may issue to prevent the placement of names or issues on a ballot even though a protest hearing has been completed, as long as the election has not yet been held." (Emphasis added.) citing *State ex rel. Crossman Communities of Ohio, Inc. v. Greene Cty. Bd. of Elections* (1999), 87 Ohio St. 3d 132, 136; *State ex rel. Bona v. Village of Orange* (1999), 85 Ohio St.3d 18, 21.

{¶41} Based on this finding, this Court concludes that appellant is precluded from bringing an injunctive action against appellee, Secretary of State or the Division of Liquor Control for allegations arising from a protest matter after an election is held. This Court bases its conclusion on the holdings in *Miles & Lee Mkt., Inc.* and *Kelli Joe, Inc., supra*. Court recognizes that the *Prince* court permitted a suit for injunctive relief to proceed after an election was held. However, that court did not consider the merits of any claims of mootness.

{¶42} This Court finds that the holdings in *Miles & Lee Mkt., Inc.* and *Kelli Joe Inc.* represent the correct application of the law. The mootness doctrine should apply equally to claims for injunctive relief as they do for claims brought under writs of prohibition and mandamus. The rationale for prohibiting protests to be continued after the election is to protect the value of the vote and the integrity of elections:

> "[T]o allow a protest to a petition for a local option election to be considered after the general election when an adequate opportunity was available for the plaintiff to challenge the petition beforehand, would unjustly disenfranchise those in the majority who chose to vote in favor of the local option. * *
>
> *Kelli Joe, Inc., supra*, citing *Brink v. Franklin Cty. Bd of Elections* (1985), 21 Ohio App.3d 283.

The *Kelli Joe, Inc.* court continued:

> The Supreme Court in *State, ex rel. Snyder, v. Wheatcraft* (1974), 37 Ohio St.2d 53, stated that the p se of the statutes allowing protests to local option election petitions and hearing thereon is to permit resolution and determination of the protests by a board of elections in sufficient time before the election to allow the orderly processes of campaigning and voting without the uncertainties caused by irresolution of protests."

{¶43} Further, prohibiting pre-election contests from interfering with post-election results furthers the public policy favoring free competitive elections. *Stern v. Bd. of Elections of Cuyahoga Cty* (1968), 14 Ohio St 2d 17s, 184; *State ex rel. Ashbrook v. Brown* (1988), 39 Ohio St.3d 115.

{¶44} For the foregoing reasons, this Court finds that appellant is precluded on the grounds of mootness from asserting any claim for injunctive relief for pre-election protest matters which were not resolved before the election was held.

IV.

{¶45} Even if injunctive relief were available, we would still find that appellant is precluded from relief on the grounds of laches. In an election setting, extreme diligence is required in prosecuting an action. *State ex rel. Ascani v. Stark Cty. Bd. of Elections* (1998), 83 Ohio St.3d

490, 493; *State ex rel. White v. Franklin Cty. Bd. of Elections* (1992), 65 Ohio St.3d 45, 48-49; *Foster v. Bd. of Elections* (1977), 53 Ohio App.2d 213, 224. If the party seeking relief fails to exercise that extreme diligence prior to the election, then he will be precluded from obtaining relief after the election.

{¶46} Laches requires a showing of: (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) material prejudice to the other party. *State ex rel. N. Olmsted Fire Fighters Assn. v. N. Olmsted* (1992), 64 Ohio St.3d 530 at 536.

{¶47} In *Miles & Lee Market, Inc., supra*, the court found that the plaintiff was precluded from seeking injunctive relief on the grounds of laches. In that case, the plaintiff brought suit after the election. The court found that the plaintiff could have, by timely investigation, discovered problems with the petition such that he could have brought a protest prior to the election. It found the board was materially prejudiced by appellant's untimely protest because it had already printed the ballots and issued absentee ballots. Consequently, the Eighth District found that the trial court appropriately granted the board's motion for summary judgment.

{¶48} In *Kelli Joe*, the operator filed a protest on September 4, 1990, with the board questioning the validity of sore signatures. At the hearing on September 13, 1990, the board invalidated some signatures, but held that

the petitions were valid. The election was held on November 6, 1990, and the electors voted to "dry up" the precinct.

{¶49} On November 21, 11990, the operator filed suit against the board of Elections, the Secretary of Stake, and the Director of the Ohio Department of Liquor Control, seeking declaratory and injunctive relief declaring the election void and seeking an injunction against the defendants from certifying the results. The court held that the suit was moot. The Tenth District noted that the operator had taken no further action on the denial of his protest until after the election and made no claim that the election was improperly conducted. The court found that R.C. 4301.391 did not permit the consideration of any pre-election procedures. The court found that there was sufficient time as a matter of law to bring a legal action contesting the board's determination prior to the general election.

{¶50} Similar cases have likewise precluded a party from seeking remedies for protest matters after an election on the grounds of lathes. In *State ex rel. Hills Communities, Inc., supra*, at 468, the plaintiff filed a complaint on September 14, 2000, in the appeals court for a writ of prohibition to prevent the board of elections from submitting a zoning amendment at the November 7th election. Both parties filed briefs and the court of appeals denied the writ on October 18, 2000. At the November 7, 2000 election, the ,voters rejected the zoning amendment.

{¶51} The plaintiff appealed the court's decision on December 4, 2000. This date was forty-seven

days after the court's judgment and twenty-seven days after the November 7th election. The case was not barred from consideration on the grounds that the normal 30-clay appeal time had expired because the case originated in the appeal courts and appeal was of right to the Ohio Supreme Court. Id. at 466. The case was brought pursuant to R.C. 519.12(H) regarding amendments to zoning resolutions. Id.

{¶52} Though there was no issue regarding the timeliness of the appeal, the Ohio Supreme Court held that the plaintiff was precluded from relief on the grounds of laches by his failure to timely prosecute his case after the appeals court had issued its decision denying the writ of prohibition and before the election was held. Id. at 467-68.

{¶53} In *State ex rel. Bona, supra,* petitioners sought to place a referendum on the November 3, 1998 ballot. The Village council refused to place the referendum on the ballot. The petitioners filed a complaint with the court of appeals requesting that a writ of mandamus be issued to the Village council to reconsider the ordinance. Like *State ex rel. Hills Communities, Inc.*, this matter was a referendum for which an action could be commenced in the appeals courts. Appeals were to the Ohio Supreme Court as of right.

{¶54} On July 28, 1999, the Tenth District denied the writ and petitioners waited until September 1, 1999 to fill their notice of appeal, a delay of 35 days. They waited another forty days, to the day of the election, to file their merit brief. They did not request expedited treatment of the appeal. The court found their actions constituted

laches which precluded the petitioners from obtaining relief even though the appeal was timely. Id. at 21.

{¶55} In cases not barred by laches, the parties have ensured that their protests are resolved - including a hearing before the board and any review thereafter - before the election. To ensure that resolution, the parties have requested expedited briefing schedules. *Keenan v. Leis* (1998), 81 Ohio St.3d 1430. In *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, the party requested an expedited briefing and review schedule and filed its merit brief within seven days of the notice of appeal, all of which permitted the court to hear the matter before the general election. Likewise, in *State ex rel. Arnett v. Winemiller* (1997), 80 Ohio St,3d 255, the party filed a motion to expedite the appeal and filed its merit brief in time for the court to consider the matter before the election.

{¶56} In this case, appellant did none of these things. On September 23, 2003, appellee denied appellant's protest. Appellant waited over two weeks before filing suit in the common pleas court on October 9, 2003. Between October 9, 2003, and the election over three weeks away on November 4, 2003, appellant did nothing to ensure that review of its protest world take place before the election.

{¶57} Appellant had from September 23 through November 2, 2003 - a period of almost six weeks - to ensure that its protest review was heard, yet did nothing to

ensure that it was heard.[8] This is not the type of "extreme diligence" appellant needed to pursue to ensure that its protest appeal was heard before the election.

{¶58} This Court finds that appellant's lack of diligence in pursuing review of its protest constitutes laches. It had ample opportunity to pursue the claim prior to the election and it failed to do so. The election and the certification subsequent thereto should not be held in abeyance because of the dilatory manner in which appellant pursued its claims.

V.

{¶59} For the foregoing reasons, this Court finds that the Summit County Common Pleas Court properly denied appellant's request for injunctive relief against the Summit County Board Of Elections, the Secretary of State and the Division of Liquor Control and affirms the trial court's order.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

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[8]It is very likely that appellant had even more time than the six weeks this Court is attributing. The record dodos not disclose when appellant first learned of Mr. Reymann's alleged wrongdoing on the petitions or when the certified letter was dated. Appellant may have had additional time before it filed its protest With appellee.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

DONNA J. CARR
FOR THE COURT

SLABY, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

ROBERT C. MEEKER, Attorneys at Law, 19 North High Street, Akron, Ohio 44308, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and

SANDY J. RUBINO, Assistant Prosecuting Attorney, Summit County Safety Building, 53 University Avenue, 6th Floor, Akron, Ohio 44308, for Appellees

The Supreme Court of Ohio

Reveria Tavern, Inc.

Case No. 05-219

v.

Summit County Board Elections, et al.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Summit County Court of Appeals; No. 21893)

Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

Reveria Tavern, Inc.

v.

Summit County Board of Elections, et al.

Case No. 05-219

RECONSIDERATION ENTRY

Summit County

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Summit County Court of Appeals; No. 21893)

Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

(2)

No. 05-480

FILED
OCT 30 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

REVERIA TAVERN, INC.,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Application for Rehearing
On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

APPLICATION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF GOOD FAITH

The undersigned counsel hereby certifies that, pursuant to Rule 44.2 of the Rules of the Supreme Court of the United States, the instant Application for Rehearing is restricted to "other substantial grounds not previously presented," in that the analysis on the doctrine of mootness by the Court of Appeals for the Ninth Appellate District, State of Ohio (Court of Appeals) under the Fifth and Fourteenth Amendments to the United States Constitution does not comply with this Court's prior decisions.

The undersigned counsel further hereby certifies that the instant Application for Rehearing is made in good faith and not for purposes of delay.

Dated: Akron, Ohio, 12-30-05.

Respectfully,

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MEMORANDUM

The Decision and Journal Entry (Decision) issued by the Court of Appeals does not comport with this Court's analysis on the doctrine of mootness and its exceptions, (1) where injunctive relief is sought with accompanying claims for relief and damages and (2) where the circumstances indicate that the subject matter of Petitioner's complaint is capable of repetition, yet evading review.

In *Memphis Light, Gas and Water Division v. Craft*, this Court held:

> The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972).

436, U.S. 1, 98 S.Ct. 1554, 1560 (1978). This Court further held:

> Our decision in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), provides a

framework of analysis for determining the "specific dictates of due process" in this case.

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 334-335, 96 S.Ct., at 903.

Memphis Light, Gas and Water Division, 436, U.S. 1, 98 S.Ct. at 1564.

In *Memphis Light, Gas and Water Division*, the Respondents were homeowners who were denied utility services in pursuing a good faith determination of the cause of "double billing" of services. There was an issue of mootness on appeal since it appeared that "respondents no longer desire[d] a hearing to resolve a continuing dispute over their bills, as the double-meter problem has been clarified during [the] litigation." 98 S.Ct. at 1559. Further, the respondents did not aver that there was a present threat of termination of service. 98 S.Ct. at 1560. The respondents insisted that their case was not moot because they sought

damages and declaratory relief, and because the dispute that occasioned the suit was "capable of repetition, yet evading review." *Id.* In finding for respondents on the issue of mootness, this Court stated:

> We need not decide whether this case falls within the special rule developed in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); see *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973), to permit consideration of questions which, by their very nature, are not likely to survive the course of a normal litigation. Respondents' claim for actual and punitive damages arising from MLG&W's terminations of service saves this cause from the bar of mootness. Cf. *Powell v. McCormack*, 395 U.S. 486, 496-500, 89 S.Ct. 1944, 1950-1952, 23 L.Ed.2d 491 (1969). Although we express no opinion as to the validity of respondents' claim for damages, that claim is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed. [Footnote omitted.]

Id.

In this case, Petitioner had been in the same location for over 40 years. The location of its business is widely known and has been recognized as a gathering place by customers from all walks of life. Petitioner has a substantial stake in that it stands to lose its customer base, thus, will lose its livelihood. Selling liquor and spirits are the attractions

for its social gatherings. It will, no doubt, suffer irreparable injury, to wit: damages, where such injury is "not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed" to have the merits of Petitioner's claims resolved.

With regard to the "capable of repetition, yet evading review" doctrine, "[a] case falls within this exception where: (1) the challenged action was too short in duration to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Porter v. Jones*, 319 F.3d 483, 489-490 (9th Cir.2003), citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Also, see *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975). In *Porter*, the Ninth Circuit Court of Appeals held:

> Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits. *See, e.g., id.; Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); *Reich v. Local 396, Internat'l Brotherhood of Teamsters*, 97 F.3d 1269, 1272 n. 5 (9th Cir.1996); *Baldwin v. Redwood City*, 540 F.2d 1360, 1365 (9th Cir.1976); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 389 (1st Cir.2000). We have explained:
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> > Election cases like the present one come within the type of controversy that is "capable of repetition, yet evading review." ... Appellate

> courts are frequently too slow to process appeals before an election determines the fate of a candidate. If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws-including the one under consideration here-could never reach appellate review.
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> *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir.1983).

319 F.3d at 490. In *LaRouche v. Fowler*, the U.S. Court of Appeals for the District of Columbia held:

> * * * "Challenges to rules governing elections are the archetypal cases for application of this exception. *See, e.g., Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *see also Branch v. FCC*, 824 F.2d 37, 41 n. 2 (D.C.Cir.1987) ("Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.' "); *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir.1997) (" [E]lections are routinely too short in duration to be fully litigated, and there is a reasonable expectation that the same party would be subjected to the same action again."); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18 (1st Cir.1996).

> Under the "[illegible]ling review" prong of this exception, we consider [illegible]nether the challenged activity is *by its very nature short in duration,* so that it could not, or probably would not, be able to be adjudicated while fully live." *Conyers v. Reagan,* 765 F.2d 1124, 1128 (D.C.Cir.1985). (internal quotations omitted). * * *

152 F.3d 974, 978 (D.C. Cir.1998). "[B]oth Supreme Court and circuit precedent hold that orders of less than two years' duration ordinarily evade review." *Burlington Northern Railroad Company v. Surface Transportation Board,* 75 F.3d 685, 690 (D.C.1996), citing *Southern Pacific,* 219 U.S. at 514-16, 31 S.Ct. at 283-84; *In re Reporters Comm. for Freedom of the Press,* 773 F.2d 1325, 1329 (D.C.Cir.1985). See also *Bellotti, supra,* 435 U.S. at 774, 98 S.Ct. at 1414 (where duration of 18 months is too short for full litigation).

The Court of Appeals found that Petitioner was precluded on the grounds of mootness from asserting any claim for injunctive relief for pre-election matters which were not resolved before the election was held. However, judging from the extenuating circumstances in which the manner the protest hearing was held, the failure to provide a fair and meaningful opportunity to be heard due to the Board's own inaction, there was no practicable way in which litigation could have been concluded within six weeks prior to election.[1] This is a far cry from the 18-month period in

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[1]A concern which one of the Board members presented on September 23, 2003 was that, as of September 23, 2003, approximately six weeks prior to the election, ballots were yet to be printed. (Board T.p.-2, Appx. __) If ballots had not been printed at that time, the Board

Bellotti and the 2-year period in *Burlington Northern Railroad Company*.

The instant case squarely fits into the exception in that the so-called process that was provided is capable of repetition, yet evading review. If Petitioner was to move to another wet, precinct, it would be subject to the same inadequate process his its protest. Petitioner would not have sufficient period of time in which to litigate its protest between the time of the hearing of such protest and the day of election. Conceivably, Petitioner will never be able to litigate the merits of its protest if the hearing and appeal process must be completed prior to the occurrence of election. Petitioner will be subject to repeated statutory and constitutional violations by the Board without complete review of the merits of its claims and objections.

CONCLUSION

Based on the above, Petitioner respectfully requests that the Court reconsiders its decision denying the petition for a writ of certiorari.

Dated: Akron, Ohio, 12-30-05.

Respectfully,

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would have had to wait until litigation was concluded before making a determination whether or not to place the issues on the ballot. If this would have been the case, it is conceivable that no election could have been held since the ballots would not have been printed and distributed in a timely manner.

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PROOF OF SERVICE

Pursuant to Rules 29 and 44 of the Rules of the Supreme Court of the United States, the undersigned counsel hereby certifies that three (3) copies of the Application for Rehearing on Petition for Writ of Certiorari was served upon the following at his/her/its/their last known address(es), by regular United States Mail, first class, postage prepaid, on the date indicated below:

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Dated: Akron, Ohio, 12-30-05.

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